

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DEBORAH DAILEY	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 16-1331
CITY OF PHILADELPHIA, <i>et al.</i>	:	

ORDER-MEMORANDUM

AND NOW, this 14th day of June 2016, upon consideration of Plaintiff's Motion for Summary Judgment (ECF Doc. No. 22), Defendants' Opposition to Summary Judgment (ECF Doc. No. 25), Defendants' Motion to Dismiss (ECF Doc. No. 23), following oral argument, and finding we need to abstain from deciding constitutionality of Philadelphia Code retirement definitions while the state court is defining whether the Philadelphia Code sections apply in the first instance, it is **ORDERED**:

1. The Clerk of Court shall place this matter on the Court's **suspense** docket until further Order;
2. Plaintiff shall file a joint status report on the state court proceeding on August 15, 2016 and every thirty (30) days thereafter until a final decision from the state court at which point Plaintiff shall immediately advise this Court of the state court's decision and we will collectively address the next steps; and,
3. Plaintiff's Motion for Summary Judgment (ECF Doc. No. 22) and Defendants' Motion to Dismiss (ECF Doc. No. 23) are **DENIED** as moot without prejudice to be renewed, in whole or in part, following return to the Court's active docket.

Analysis

Plaintiff Deborah Dailey filed suit in two courts challenging Philadelphia Code Sections 22-1302(1)(a)(.4) and (.5)¹ after the City of Philadelphia Board of Pensions and Retirement (the “Board”) disqualified her retirement benefits. The Board based its February 26, 2016 final decision based on her guilty plea in state court to theft by using the credit card of the First Judicial District of Pennsylvania (“FJD”), while employed as a Deputy Court Administrator, to pay her son’s debts. In this Court, she brings constitutional challenges under the Fifth, Eighth, and Fourteenth Amendments against the City of Philadelphia, the Board, and Board members under 42 U.S.C. §1983. One day later, she filed an appeal in the Court of Common Pleas from the Board’s decision, challenging its application of Sections (.4) and (.5) of the Code to her and seeking to reverse the Board’s decision on a *de novo* standard. In both courts, Ms. Dailey asks for a finding the Code does not apply to disqualify her from pension eligibility.

¹ Title 22 of The Philadelphia Code is known as the “City of Philadelphia Public Employees Retirement Code” (“Code”). *See* Code at §22-100 *et seq.* Subsections (1)(a)(.4) and (.5) of the “Disqualification” provisions of Section 22-1302 are at issue in this litigation. Subsections 13-1302(1)(a)(.4) and (.5) provide:

(1) Notwithstanding any other provision of this Title, no employee nor any beneficiary designated by or for any employee shall be entitled to receive any retirement or other benefit or payment of any kind except a return of contribution paid into the Retirement System, without interest, if such employee:

(a) pleads or is finally found guilty, or pleads no defense, in any court, to any of the following:

. . .

(.4) Theft, embezzlement, willful misapplication, or other illegal taking of funds or property of the City, or those of any official agency of the City, or agency, engaged in performing any governmental function for the City or the Commonwealth;

(.5) Malfeasance in office or employment;

Our issue is whether we should decide constitutional issues necessarily dependent upon a finding from the state court as to the application of the pension forfeiture section of the Code to Ms. Dailey. In deference to the Pennsylvania courts, we invoke *Pullman*² abstention and refrain from determining the constitutional issues presented. Although abstention is the exception, not the rule, “[w]hen a federal court is presented with both a federal constitutional issue and an unsettled issue of state law whose resolution might narrow or eliminate the federal constitutional question, abstention may be justified under principles of comity in order to avoid ‘needless friction with state policies.’”³

We consider whether “three special circumstances” exist to determine the application of *Pullman* abstention: “(1) Uncertain issues of state law underlying the federal constitutional claims brought in federal court, (2) State law issues amenable to a state court interpretation that would obviate the need for, or substantially narrow, the scope of adjudication of the constitutional claims; and (3) A federal court’s erroneous construction of state law would be disruptive of important state policies.”⁴ If we find all three “special circumstances” present, we then make a discretionary determination whether abstention is “appropriate under the circumstances of the particular case, based on the weight of these criteria and other relevant factors.”⁵

² *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941) (“*Pullman*”).

³ *Chez Sez III Corp. v. Twp. of Union*, 945 F.2d 628, 631 (3d Cir. 1991) (quoting *Pullman*, 312 U.S. at 500).

⁴ *Id.*, 631 (citing *D’Iorio v. County of Delaware*, 592 F.2d 681, 686 (3rd Cir. 1978), *overruled on other grounds Kershner v. Mazurkiewicz*, 670 F.2d 440, 448 (3d Cir. 1982)(*en banc*)).

⁵ *Id.*

First Factor: Uncertain issues of state law underlie Ms. Dailey's constitutional claims.

Ms. Dailey challenges subsections (.4) and (.5) as unconstitutionally vague. She challenges (.4) as applied and challenges (.5) both facially and as applied. When faced with a “void for vagueness” challenge to a state law, we distinguish between two types of vagueness attacks to determine if *Pullman* abstention is appropriate. “Where the case turns on the applicability of a state statute or regulation to a particular person or a defined course of conduct, resolution of the unsettled question of state law may eliminate any need for constitutional adjudication. Abstention is therefore appropriate.”⁶ But “[w]here . . . the statute or regulation is challenged as vague because individuals to whom it plainly applies simply cannot understand what is required of them, abstention is not required.”⁷ In other words, if “no single adjudication by a state court could eliminate the constitutional difficulty,” abstention may not be appropriate.⁸

Ms. Dailey’s challenge to (.4) turns on the applicability of the Code to her guilty plea of “theft of movable property” under Pennsylvania law. A decision by the Court of Common Pleas determining whether the Code applies to Ms. Dailey may eliminate the need for our constitutional adjudication. Abstention is appropriate as it relates to Ms. Dailey’s challenge to (.4).

Whether we should abstain from deciding Ms. Dailey’s challenge to (.5) involves more complex analysis. The provisions of the Code relating to pension eligibility “plainly apply”⁹ to

⁶ *Procunier v. Martinez*, 416 U.S. 396, 401 n. 5 (1974) (citing *Baggett v. Bullitt*, 377 U.S. 360, 376-377 (1964)), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

Ms. Dailey because her employment with the FJD qualified her for a pension. The conduct proscribed in (.5), pleading guilty to “malfeasance in office or employment,” may be inapplicable as well because “malfeasance in office” is no longer a common law crime in Pennsylvania and the statute may be open to “an indefinite number”¹⁰ of interpretations. A Pennsylvania court has also defined “malfeasance” in (.5) as an act that is “willful, corrupt, and amount[ing] to a breach of duty legally required by one who has accepted public office.”¹¹

We cannot determine, in the first instance, whether §§ (.4), (.5) of the Philadelphia Code applies. At a minimum, we find uncertain issues of state law as to whether her guilty plea to theft could also constitute “malfeasance” under Pennsylvania law, as addressed by at least one Pennsylvania appellate court.

Second Factor: State law issues amenable to state court interpretation would obviate the need for the scope of adjudication for Ms. Dailey’s constitutional claims.

We next ask whether a state court’s decision would eliminate our need to decide the constitutional issues. We are “not concerned with whether there is a ‘bare, though unlikely, possibility that the state courts *might* render adjudication of a federal question unnecessary’ but

¹⁰ *Baggett*, 377 U.S. at 378.

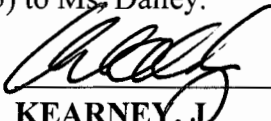
¹¹ See *Merlino v. Phila. Bd. of Pensions and Retirement*, 916 A.2d 1231, 1234-35 (Pa. Commw. 2007) relying on *Commw. v. Bellis*, 472 A.2d 194, 200 (Pa. Super. 1984). As to a “void for vagueness” argument as to (.5), the Commonwealth Court in *Wiggins v. Phila. Bd. of Pensions and Retirement*, 114 A.2d 66 (Pa. Commw. 2015) declined to address the issue. In *Wiggins*, a former Philadelphia Police Officer appealed from an order of the Court of Common Pleas affirming a decision of the Philadelphia Board of Pensions and Retirement disqualifying him from his pension for “malfeasance in office or employment.” *Id.* at 68. The Commonwealth Court declined to decide whether §22-1302(1)(a)(.5) of the Code “is vague because it omits any statement about what conduct constitutes ‘malfeasance in office or employment’ that will justify a pension termination.” *Id.* at 75, n.12.

rather whether the Ordinance is ‘obviously susceptible to a limiting construction.’”¹² In addition, “where there is an action pending in state court that will likely resolve the state-law questions underlying the federal claim, the [court has] regularly ordered abstention.”¹³ If the Court of Common Pleas determines (.4) and (.5) do not apply to Ms. Dailey, there would be no need for us to determine the constitutionality of these provisions. Ms. Dailey raises valid challenges to whether the Board erred because the Philadelphia Code may not apply to her guilty plea. Thus, the second requirement for the abstention is satisfied.

Third Factor: Our erroneous construction of state law would be disruptive of important state policies.

Ms. Dailey challenges Pennsylvania’s interest in preserving government resources and discouraging its employees from engaging certain proscribed conduct. By limiting pension eligibility to those employees who, *inter alia*, refrain from committing and pleading guilty to enumerated crimes, and malfeasance in office or employment, the Code serves both of these interests. If we erroneously construed the Code, our decision would disrupt these important policies. The third prerequisite for the *Pullman* abstention is met.

We find each of the factors warranting *Pullman* abstention is satisfied. Having so found, we exercise our discretion and find *Pullman* abstention appropriate. We accordingly place this matter on the Court’s suspense docket until the state court resolves whether the Board erred in its application of the Code Sections (.4) and (.5) to Ms. Dailey.


 KEARNEY, J

¹² *Chez Sez III Corp.*, 945 F.2d at 632 (quoting *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 237 (1984)).

¹³ *Harris Cnty. Comm’rs Court v. Moore*, 420 U.S. 77, 83 (1975).